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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
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CHIBARDUN TELEPHONE COOPERATIVE, INC.	)	CC Docket No. 97-219
CTC TELCOM, INC.	)	
	)	
Petition for Preemption Pursuant to Section 253 of the Communications Act of Discriminatory Ordinances, Fees and Right-of-Way Practices of the City of Rice Lake, Wisconsin	)	

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OFFICE OF THE SECRETARY

TO: THE COMMISSION

PETITION FOR ENVIRONMENTAL IMPACT STATEMENT

MICHIGAN MUNICIPAL LEAGUE

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TABLE OF CONTENTS

SUMMARY

Federal agencies are required to prepare an Environmental Impact Statement ("EIS") for actions which may significantly affect the quality of the human environment. Chibardun asks this Commission to preempt requirements relating to the rights-of-way including those that affect the environment, health and safety. Under Council on Environmental Quality ("CEQ") rules, (1) -- adverse effects on public health or safety are considered an environmental impact, (2) -- preempting environmentally oriented state or local requirements generally requires an EIS, as do (3) -- actions that tend to be precedential, individually or cumulatively, on environmental, health or safety matters. Granting Chibardun's request in whole or in part is likely to be precedential as shown by the participation in this case of national telecommunications providers, their trade associations and municipalities and municipal associations from across the country.

And any Federal action that may adversely affect highways listed or eligible for listing in the National Register of Historic Places ordinarily requires an EIS under CEQ rules.

Chibardun states that it is asking for preemption of "environmental . . . safety and health matters." Chibardun Petition, at 13. Among the requirements it wants preempted are provisions requiring it to relocate its facilities within the rights-of-way if required by public convenience or necessity. Relocations provisions are essential to allow prompt repair and protect the environment, health and safety in the event of major sewer, water or gas main breaks. Such breaks can involve major discharges of sewage or contamination of water supplies and require immediate action. Utilities in the area must relocate their lines (on an emergency basis) so that construction crews and

heavy equipment can gain access to the break and surrounding areas. State and local requirements applicable to telecommunications providers typically include relocation provisions. Preemption of them would have a severe impact on the public health, safety and environment.

Relocation provisions are also important to aid the prompt and economical reconstruction of roads and highways to change their size, alignment and the like. Such reconstruction is typically motivated by health and safety concerns. Giving telecommunications providers a vested right of ownership of a certain portion of the right-of-way from which they could only be removed by condemnation proceedings would prohibit or significantly limit state or local units of government in their ability to rebuild highways to meet health, safety and environmental goals.

Advance disclosure of construction plans and schedules is commonly required by state and local units of government. This allows them to coordinate and minimize construction in the rights-of-way. This minimizes the environmental impact. And streets that are wholly or partly closed can delay emergency vehicles (police, fire, EMS) where a few seconds or minutes can have a substantial impact on fires, public disturbances, cardiac arrest cases and the like. Preempting these requirements pursuant to Chibardun's request would have a health and safety impact.

States and municipalities frequently require telecommunications providers to reimburse them for all costs resulting from the provider's activities and to provide a broad indemnity, broad insurance coverage, and a bond or letter of credit. Chibardun asks that these requirements be preempted. Such provisions are vital because they go to the need of states and local governments to have meaningful financial assurances from entities using the public rights-of-way that state and local general funds are protected against the large claims that can result from such work. To the

extent general funds are not protected states and local governments will be impaired in their ability to deliver essential services (water, sewer, schools, police, fire, EMS). Any adverse impact on such financial assurances -- and hence on such services -- affects the public health, safety and environment thus requiring an EIS. CEQ rules require that the Commission consider such indirect impacts of its actions. Municipalities are concerned because if there are multiple tortfeasors one "deep pocket" defendant can be held liable for the entire amount of any judgment. States and local governments are often joined in right-of-way suits and face the prospect of paying the entire amount of any damage claim resulting from activities of telecommunications providers even if the government unit is one percent responsible. This is particularly a risk now where increasingly telecommunications providers have few or no unencumbered assets and tend towards being "judgment-proof." Insurance, indemnities and other financial assurances assure that telecommunications providers pay the claims which they cause and do not affect state or local general funds, potentially impairing the delivery of essential governmental services.

Chibardun also contends that under the "competitive neutrality" provisions of Section 253 state and local legal requirements must be frozen at the level imposed on incumbent providers "when they entered the market." Chibardun may be referring to either the late nineteenth century (when telephone and electric companies entered the market) or the period after 1950 (when cable companies entered the market). Whatever the demarcation point, its contention that the requirements applicable to it be frozen at some point in time and all subsequent environmental, health and safety related requirements preempted, requires an EIS.

Chibardun also contends that any requirements imposed on it must be preempted unless they are concurrently imposed on all providers. As the Commission discussed at length in its City of Troy decision and in its cable television customer service order, utility providers frequently contend that they have "vested rights" under the franchise or other permission given them to occupy the public rights-of-way. They then contend that the Contracts Clause of the U.S. Constitution and other laws that state and local units of government cannot unilaterally impose any additional requirements, at least until the provider's current rights expire. And in a number of states, telephone and other providers contend that they have franchises of long or unlimited duration, typically dating from the late nineteenth or early twentieth century. If the Commission is going to preempt local health, safety or other environmentally oriented requirements unless they apply to all providers, then in order to determine the environmental impact of its action it must analyze and determine state by state (and municipality by municipality for major cities) which health, safety or other environmentally oriented restrictions cannot be applied to the incumbent provider. This will allow an accurate determination and minimization of the environmental, health and safety requirements which the Commission is preempting.

Under CEQ rules this Commission is required to prepare an EIS, analyzing both the direct and the indirect effects of any agency action, including those that have effects due to their precedential nature. If Chibardun's petition is granted in whole or in part it could significantly restrict the environmental, health or safety requirements which states and municipalities may impose on telecommunications providers and affect historic highways nationwide. For this reason an EIS is required.

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TO: THE COMMISSION

PETITION FOR ENVIRONMENTAL IMPACT STATEMENT

Pursuant to Section 1.1307(c) of the Commission's rules, the rules (40 C.F.R. Chapter V) of the Council on Environmental Quality ("CEQ") and the National Environmental Policy Act ("NEPA", Public Law 91-190, 42 U.S.C. § 4321 and following) the Michigan Municipal League ("the League") submits this petition to require the Commission to prepare an Environmental Impact Statement ("EIS") and comply with NEPA (and Commission and CEQ rules implementing NEPA) as follows:

Introduction

1. Summary. Federal agency preemption of state or local environmental, health or safety laws require an EIS. Matters relating to the environment, health and safety are one of the main focuses of state and local laws, permits and franchises relating to the public rights-of-way. Chibardun asks this Commission to preempt such state and local requirements (including seeking

an exemption from "environmental . . . safety and health matters", Chibardun Petition (defined below), at 13) and by preventing states and local governments from imposing on new telecommunications providers requirements and obligations that were not "historically" imposed upon existing utilities "when they entered the market" (Chibardun Petition, at 9, Exhibit D thereto at 1, 2) or at minimum which are not imposed upon other providers at the present time. For these reasons the Commission must prepare an EIS and follow Commission and CEQ procedures attendant thereto prior to granting any of the relief of which Chibardun requests.

2. The League and Its Interest. The Michigan Municipal League is a non-profit organization created in 1899 to represent and forward the interests of cities and villages in the State of Michigan. Its membership is comprised of over 500 Michigan cities and villages whose residents include 98% of the state's urban population. The Michigan League's participation in this matter was authorized by the Board of Directors of the Michigan Municipal League Legal Defense Fund, whose purpose is to represent the interests of member cities and villages in lawsuits and similar matters of statewide importance.

3. The League has been involved on environmental, health, and safety matters on behalf of its members and their residents for many years. The League is concerned that Chibardun Telephone Cooperative's ("Chibardun") October 10, 1997 Petition in this case ("Petition" or "Chibardun Petition"), if granted in whole or in part, could prevent the imposition of environmental, health, and safety measures on telecommunications providers by League members and other municipalities and have significant environmental, health, and safety effects, both direct and indirect, as is set forth below.

4. Disclaimer. This filing is confined to the necessity for the Commission to prepare an EIS if it grants the relief Chibardun has requested, in whole or in part. For that reason this filing takes Chibardun's claims and request for relief at face value. Doing so should not be construed as agreement or acquiescence by the League that Chibardun's claims are valid, appropriate or that the Commission has the authority to grant the relief requested. In fact, the League believes that the opposite is the case.

Legal Requirements

5. National Environmental Policy Act. NEPA is our nation's basic charter for protection of the environment at the Federal level. It requires the preparation of an EIS for Federal actions which may significantly affect the quality of the human environment. NEPA § 102(2)(C) (42 U.S.C. § 4321 and following); 40 C.F.R. § 1508.18, and CEQ comments thereon at 43 Federal Register 55,989 (Nov. 29, 1978). As required by CEQ rules and the courts, among other things:

-- Federal agencies are required to act in fulfillment of the letter and spirit of NEPA. *See e.g.*, 40 C.F.R. §§ 1500.1, 1500.3.

-- Environmental considerations must be taken into account early in the Federal agency decision-making process so as to serve as a practical contribution to agency decision-making, not just as a rationalization after the fact of decisions already arrived at. 40 C.F.R. § 1502.5.

-- A principal goal is to minimize the environmental impacts of Federal agency action. 40 C.F.R. § 1502.1. To this end in particular, Federal agencies must consider conflicts of their actions with state and local government regulations, involve affected

state and local governments in the environmental process (*see*, e.g., 40 C.F.R. §§ 1502.16(c), 1501.7, 1503.1(a)(2)(i), 1506.6(b)(3)(i)), and to the extent possible remove such conflicts (40 C.F.R. §§ 1502.16(c), 1506.2(d)).

-- To achieve the preceding goals, among other things, Federal agencies must consider taking no action at all. *See e.g.*, 40 C.F.R. § 1502.14.

6. Failure to prepare an EIS or to do so in accordance with applicable law routinely results in Federal court injunctions against the agency action in question.

7. Health and Safety/Environmental Preemption. CEQ rules set forth factors which determine whether an EIS is required. First, under these rules (and applicable court decisions) one key factor is "the degree to which the proposed [agency] action affects public health or safety." 40 C.F.R. § 1508.27(b)(2) (emphasis supplied). In other words, an impact on public health or safety is an environmental impact.

8. Second, a principal goal of NEPA and the rules implementing it is to minimize the environmental impacts of action by Federal agencies. *See e.g.*, 40 C.F.R. § 1502.1. Preempting state or local environmentally-oriented requirements thwarts this goal. As a result, CEQ rules ordinarily require an EIS for Federal action which "threatens a violation of Federal, state or local law or requirements imposed for the protection of the environment." 40 C.F.R. § 1508.27(b)(10). And compare 40 C.F.R. § 1506.2(d).

9. Third, the several states and municipalities throughout the country are far better situated than an agency in Washington, D.C. to determine and minimize the environmental impact of actions within their borders. To this end, CEQ rules have extensive requirements on involving

affected state and local governments in the environmental assessment process (*see e.g.*, 40 C.F.R. §§ 1502.16(c), 1501.7, 1503.1(a)(2)(i), 1506.6(b)(3)(i)) with one principal goal being identifying and minimizing potential conflicts of Federal action with state and local government regulations (especially with state and local environmental regulations). (*See e.g.*, 40 C.F.R. §§ 1502.16(c), 1506.2(d)).

10. Fourth, the CEQ rules state that the degree to which Federal action may adversely affect "highways" listed or eligible for listing in the National Register of Historic Places is another key factor typically requiring an EIS. 40 C.F.R. § 1508.27(b)(8) (emphasis supplied).

11. Precedential Nature. Finally, agency actions which tend to be "precedential" (individually or cumulatively) on environmental, health, or safety matters require an EIS. *See* CEQ rules at 40 C.F.R. § 1508.27(b)(6) which state that a significant factor in requiring an EIS is:

> "The degree to which the [agency] action may establish a precedent for future actions with significant effects or represents a decision in principal about a future consideration." Id.

See also, 40 C.F.R. § 1508.18(a), (b)(1) which state that agency actions involving adoption of official policies or new or revised policies require an EIS. The key is the effect of the Commission's decision -- it is not exempted from preparing an EIS because it is not itself licensing or permitting new physical facilities.

12. The potential precedential nature of this case is shown in part by the broad claims made by Chibardun. It is also shown by the participation in this case of national telecommunications providers (AT&T, MCI, GTE) and their trade associations, none of whom (other than GTE, see below) have facilities in or near the City of Rice Lake and who state that their

intervention is a part of general "efforts to ensure that state and local governments comply with the letter and spirit of Section 253." *See e.g.*, Comments of the United States Telephone Association, at 5. GTE has facilities in Rice Lake, but its opposition was filed by GTE Service Corporation "on behalf of [all] its affiliated domestic telephone operating, wireless and video companies" and addresses GTE's views generally on the authority of local governments relating to telecommunications matters. Opposition of GTE to Petition for Section 253 Preemption, at 3-5. Finally, the Wisconsin League of Municipalities, municipalities nationwide and municipal associations have also filed in this case, specifically due to its potential precedential impact.[1]

13. The Commission's decision in this case thus will likely affect many, if not most, streets and highways in the U.S. given that the Commission is interpreting statutory sections that apply to "state or local" statutes, regulations or other legal requirements. *See e.g.*, Section 253(a) and (c) of the Telecommunications Act of 1996 ("1996 Act").[2]

Environmental Effects

14. Introduction. Examples of the potential environmental effects of granting Chibardun's Petition in whole or in part are set forth below. As is set forth in the CEQ rules, an EIS can be

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[1] Evidence of the potential precedential effect of a decision in this case is shown by the discussion in the pleadings to date in this matter of this Commission's prior Section 253 decisions in Troy (TCI Cablevision of Oakland County, Inc., FCC 97-331 (Sept. 18, 1997)) ("Troy"), Classic Telephone (Classic Telephone Inc., 11 FCC Rcd 13,082 (1996)), and Public Utility Commission of Texas (In re Public Utility Commission of Texas, FCC 97-346 (Oct. 1, 1997)).

[2] This broad impact of a Commission decision increases the potential severity of its environmental effects. For this reason CEQ rules provide that the broader the "context, such as national" or more severe the effects of an agency action, the more an EIS is required. 40 C.F.R. § 1508.27(a), (b).

required either due to the direct effects of agency actions, their indirect effects or a combination of the two. 40 C.F.R. §§ 1502.16(a), (b), 1508.8(a), (b). Indirect effects are those "caused by the [agency] action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b). Corresponding to the preceding, the impacts described below generally proceed from the immediate and direct to those which are indirect but foreseeable.

15. Request for Environmental, Health, and Safety Preemption. Chibardun has expressly recognized that it is asking this Commission to preempt state and local requirements relating to health, safety, and environmental matters. Specifically, it objects to the City of Rice Lake's Ordinance No. 849 because it:

> " . . . sets the stage for imposition [sic] upon potential competitors such as Chibardun of requirements extending far beyond normal right-of-way considerations to environmental, economic, infrastructure, safety and health matters." Petition, at 13 (emphasis supplied).

16. The following are only some examples of the health, safety and environmental effects of granting Chibardun's Petition, in whole or in part. The Environmental Assessment and EIS which this Commission is required to prepare -- as well as the detailed processes involved in preparing such assessments and statements -- will reveal other health, safety and environmental impacts.

17. Relocation Provisions. Chibardun challenges, among other things, the relocation provisions which the City of Rice Lake proposed. The proposal was as follows:

> "12. Relocation of Telecommunications Network. Grantee shall, at its expense, protect, support, temporarily disconnect, relocate or remove from any Right-of-Way any portion of its Network when so required by City by reason of traffic conditions or public safety, dedications of new

> Rights-of-Way and the establishment and improvement thereof, widening and improvement of existing Rights-of-Way, street vacations, highway construction, change or establishment of street grade, or the construction of any public improvement or structure by City or any governmental agency."

18. State and local units of government[3] typically include in their laws and agreements relating to the rights-of-way relocation provisions similar to the preceding. Such provisions, in combination with other provisions, in substance typically state that although the provider may occupy the rights-of-way, it has no "vested right" to any particular location therein and shall relocate its facilities therein (at its expense) as the state or local government may require for purposes of the public convenience or necessity. It may be of particular interest to this Commission that often such provisions recite that entities such as Chibardun do not obtain any "vested rights" *vis a vis* any subsequent provider. Thus if crowding in the rights-of-way would require Chibardun to relocate its lines so as to allow a subsequent competing provider to provide service Chibardun can be required to do so at its expense.[4]

19. Relocation provisions are essential to protect the environment, health and safety. One example in this regard is a trunk or interceptor sewer line break. Trunk or interceptor sewers transport sewage from smaller sewer collections systems to treatment plants. They are often large

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[3] This and subsequent sections of this petition refer to the actions, policies, or requirements of state and local units of government regarding public rights of way. This is because the Commission is being asked to interpret and apply sections of the 1996 Act which apply to "state or local" statutes, regulations, or other legal requirements relating to the public rights of way. *See* 47 U.S.C. § 253. The Commission, thus, must determine the environmental impact of its action on all such state and local units of government.

[4] The preceding typically occurs where there are both relocation and "no priority of use" provisions in the law or agreement.

enough in diameter that a car or truck can be driven through them. Such sewers can and do break. The consequences are highly adverse to the area and downstream water sources. Tens of thousands or millions of gallons of raw sewage per day are spilled and flow untreated into waterways, flood the land and flood buildings and residences in low lying areas.

20. To fix the break and restore sewer service municipalities frequently must require all utilities with facilities in the area to relocate their lines (on an emergency basis) so that construction crews and heavy equipment can gain access to the break and access to surrounding areas which are being washed away by the flood of raw sewage. Preemption or restrictions such as Chibardun is requesting would have an immediate and severe impact on the public health, safety and the environment. An EIS is thus required for the preemption requested by Chibardun.

21. The provision objected to by Chibardun not only has provisions on relocation, but also imposes obligations to "protect" and "support" the affected rights-of-way. Such provisions are essential because a significant cause of collapses of roadways, sewers and water mains is the lack of adequate protection or lateral support for the facilities in question. Requiring telecommunications providers such as Chibardun to protect such facilities and provide such support is essential to protect public health, safety and the environment. For these reasons as well, preemption as requested by Chibardun requires an EIS.

22. Water main breaks raise somewhat similar concerns. Of concerns here are both breaks in residential mains (4 inches to 24 inches in diameter) and in the larger force mains which supply water to a wide area. The water in such mains is under high pressure and a break is analogous to turning loose a high pressure 24" to 40" fire hose underground, which washes away the street,

roadway and adjacent soil and structures. The potential effects on the health, safety and environment include not only the loss of potable water (or inadvertently providing contaminated water) to persons "downstream" of the break, but the erosion of supporting soil and structures for building foundations, as well as collapsing adjacent utilities such as gas, electricity and steam. As this Commission should be aware, washing away the soil around these other underground utilities can easily lead to the rupture of gas mains, steam mains, electric mains and the like with explosive, lethal consequences for inhabitants of the area and further damage to the utilities, people and area in question.

23. For the reasons described above, relocation provisions are essential in laws and regulations relating to the rights-of-way to aid prompt repairs should a water main break occur. Preemption or restrictions such as Chibardun is requesting would have an immediate and severe impact on the public health, safety, and the environment. Chibardun's request for preemption of such relocation provisions requires an EIS.

24. Finally, relocation provisions are essential for highway construction. The relocation provision that Chibardun is objecting to shows this by its extensive references to "traffic conditions . . . dedications of new rights-of-way and the establishment and improvement thereof, widening and improvement of existing rights-of-way, street vacations, highway construction, change or establishment of street grade . . .."

25. As the Commission can appreciate, safety and health concerns are a significant reason to rebuild roads and highways and change their size, alignment and the like. In such construction, measures have to be taken to minimize the effects on the environment. Utilities are typically

required to relocate their facilities -- at their expense -- during any such highway reconstruction. Proposing to give one entity (new telephone entrants) or a class of utilities (telecommunications providers) a vested right in a certain location in the rights of way from which they either cannot be removed at all or can only be removed at public expense – such as by condemnation proceedings -- is highly unusual and will either prohibit or significantly limit states and local units of government in their ability to reconstruct highways to meet health, safety and environmental goals. For this reason, an EIS is required.

26. Construction Plans, Schedules and Contractors. Chibardun objects to disclosing its construction plans, schedules and contractors. *See e.g.* Petition, at 15. Requiring advance disclosure of construction plans, schedules and contractors is somewhat common in state and local right-of-way related laws and agreements.

27. Such information allows municipalities and states to coordinate construction in the rights-of-way so as to minimize the amount of construction, its disruption and costs. Such coordination minimizes the environmental impacts of construction such as by ensuring that a street or highway is torn up once and not repeatedly. It also minimizes the health and safety impacts of construction by minimizing the amount of time that a street is wholly or partially closed and thus a greater risk to the safety of the traveling public (such as by diminishing construction-related accidents). It also affects the health and safety of the community because streets that are wholly or partly closed delay emergency vehicles (police, fire, EMS) where a few seconds or minutes can have a substantial impact on fires, public disturbances, cardiac arrest cases and the like.

28. For the preceding reasons, advance disclosure of construction plans and schedules so that they can be coordinated with overall work in the rights-of-way is a common state and local requirement. Any preemption of such requirements would have a significant health, safety and environmental impact such that an EIS is required.

29. Similarly, disclosure of contractors to be used in the rights-of-way is important. Some contractors have good compliance records. Others do not. States and local governments own the rights-of-way or hold them in trust. They have an obligation to protect the health and safety of the public and the environment. State and local governments thus must retain the right to prevent unqualified contractors from working in the public rights-of-way. Unqualified contractors include those who violate construction requirements, flaunt safety-related regulations, or disregard the environmental controls applicable to construction in the rights-of-way (for example, to prevent sediment and soil from washing into waterways and drains). Any Commission proposal to preempt such requirements requires an EIS.

30. Indemnity, Insurance and Cost Reimbursement. Chibardun objects to the City of Rice Lake's proposal to require it to reimburse the City for "any and all costs" incurred by the City with respect to Chibardun's activities; to broadly indemnify the City and its agents against harms resulting from Chibardun's work in the rights-of-way; to provide broad insurance coverage; and to provide an irrevocable letter of credit. *See generally* Chibardun Petition, at 15-16, 22-23. These provisions are addressed collectively because they go to a fundamental issue: The need of states and local units of government to require meaningful financial assurances from entities using the public rights-of-way such that state and local general funds are protected so that the ability of states and

municipalities to deliver essential services (water, sewer, schools, police, fire, EMS) is not jeopardized by damage claims from work in the public rights-of-way. Any adverse impact on such assurances -- and hence on such services -- affects the public health, safety and environment, thus requiring an EIS.

31. In this regard, states and local governments provide essential services such as police protection, fire protection, schools, emergency medical service (EMS), water, sewer and other utility services. Fire departments increasingly are environmental protection response teams. A significant concern for state or local governments is that their ability to provide these essential services not be impaired, such as by large money judgments resulting from damage claims from private entities working in the public rights-of-way. This concern is heightened due to the recent proliferation of such private telecommunications entities, in part due to the 1996 Act.

32. This petition has set forth above some of the things that can go wrong in the public rights-of-way. One not mentioned so far is gas line explosions. As the Commission should be aware, natural gas is provided to most communities in the United States. Gas is extremely explosive. There have been a number of instances where work by utilities and cable companies in the rights-of-way has cracked or breached high pressure gas mains. Particularly in sandy soils this can result in widespread damage as the escaping gas, being heavier than air, percolates through the soil to the basement of adjacent buildings where it collects until it is set off by a spark or flame (such as from a water heater pilot light). The explosive force can be similar to setting off sticks of dynamite in the basement of the building, typically resulting in its destruction. For example, such a chain of events caused by a TCI contractor recently destroyed several million dollars worth homes

near Denver. Earlier, cable company operations affecting an underground gas line led to the damage or destruction of approximately 70 homes in a subdivision on the East Coast.

33. States and municipalities are concerned because whenever there are significant claims, plaintiffs tend to sue all parties who potentially might be held responsible. States and local units of government are often "target defendants" in this regard if only because of their "deep pockets." Claims against them relating to right-of-way claims may include failure to adequately supervise the telecommunications provider doing the work, allowing unqualified entities into the rights-of-way, failure to act quickly enough to repair or contain the damage, strict liability, or other claims.

34. Of particular concern to state and local units of government is that where there are multiple tortfeasors, one defendant often can be held liable for the entire amount of any judgment. Thus, state and local units of government face the prospect of paying tens or hundreds of millions of dollars of claims even if they are only one percent responsible. And the prospect of recovering the other 99 percent from the telecommunications provider that was principally culpable is being seriously diminished because (as discussed below, see especially ¶ 37 and following) such entities increasingly have few unencumbered assets, or otherwise often effectively are "judgment proof." The increasingly likely result is that any substantial claims will be paid in full from the state or municipal general fund and not by the telecommunications provider who is principally culpable.

35. Municipalities have to make sure that there is adequate assurance that the damage awards resulting from private work in the rights-of-way do not affect the municipal general fund and hence its ability to deliver essential services to its residents, as described above. The disruption of such services would have a significant health, safety and other environmental effects.

36. State and local concerns in this regard are increasing due to (1) -- increasing congestion in the public rights-of-way; (2) -- an increasing number of providers wishing to use such rights-of-way, such as Chibardun; and (3) -- a decline in the financial strength/responsibility and in the construction knowledge and standards of such entities.

37. In the past, states and local units of governments typically dealt with one telecommunications provider which was large, of unquestioned financial strength, usually adhered to high construction practices and had no danger of bankruptcy or going out of business. By comparison, new providers often lack these attributes.[5] Their unencumbered assets often are few, either because (1) -- they are startup companies with few unencumbered assets, or (2) -- even if they are subsidiaries of large, publicly held corporations they are structured (through multiple tiers of intermediate corporations) such that the entity with facilities in the rights-of-way has few unencumbered assets and the parent entity with substantial assets is insulated from major losses at the local level. The earnings prospects for such new providers is often uncertain, certainly less certain than those of the rate of return regulated monopolies of the past. There is no assurance that the new entities will be around for the long-term -- in fact, there is a significant likelihood that competition will result in some going bankrupt and abandoning their facilities.[6] The management of some of the new companies has little experience in right-of-way or construction matters. As a

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[5] At minimum, states and local governments cannot assume new providers have these new attributes.

[6] The history of "franchise competition" in the U.S. 100 years ago is quite clear on this point. States reacted then to the advent of modern utilities such as electric, telephone and gas by awarding multiple franchises. Inevitably, all but one provider went out of business, often leaving municipalities to deal with abandoned, derelict and unsafe structures in the rights-of-way.

practical matter, the businesses are sometimes structured so that if they are profitable they will continue in operation, and if not they will be abandoned, leaving states and municipalities to deal with the resulting abandoned facilities and resulting dangerous conditions in the rights-of-way.

38. Provisions such as Chibardun objects to help ensure that the new providers are financially responsible for all costs, claims or damage that may result from their actions in the public rights-of-way – and that states and municipalities are not hamstrung in their essential functions by such costs.

39. States and municipalities increasingly are thus requiring greater financial assurances than in the past to ensure that the public rights-of-way are protected and that the state or municipality is not placed at financial risk due to improper conduct by new providers in the public rights-of-way. These requirements manifest themselves in the form of increased insurance requirements, requiring insurance to be provided on an "occurrence" rather than a "claims made" basis (such that insurance coverage will be present even if the provider goes out of business and stops paying premiums) and requirements for bonds and letters of credit (so that, among other things, a provider's facilities can be removed from the rights of way and dangerous conditions corrected should the provider go out of business)[7]. Companion provisions require broad indemnities, require that the providers compensate state and local governments for all costs that they

[7] For example, Michigan's Telecommunications Act was amended in 1995. Among other things, it expressly provides for bonds to be posted by telecommunications providers to cover the costs of returning public ways to their original condition after the provider's use. MCL § 484.2251(3).

cause, name local governments as additional named insureds on policies, require advance notice if an insurance policy is terminated and the like.[8]

40. For similar reasons, states and local governments typically require their approval in advance prior to a transfer or change of control of the entity operating in the public rights-of-way. Otherwise the preceding protections would largely be for naught. For example, the preceding protections would have little effect if a solvent, well managed provider with good construction practices could obtain a permit with conditions appropriate to its circumstances and then transfer it without any change in requirements to a provider with few assets, poor management, and a poor track record of complying with construction, environmental, health, or safety laws. States and local governments therefore typically reserve the right to review and impose appropriate conditions on any proposed transfer.

41. Very large damage claims can result from the deaths, personal injuries and property damage that can be caused by work in the public rights-of-way. Some indication of this is illustrated by the preceding examples. For the reasons set forth above, any preemption of requirements such as those requested by Chibardun would unduly expose states and municipalities to such claims and would impair their ability to provide essential services. This would have a direct effect on public health, safety and the environment, thus requiring an EIS.

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[8] States and municipalities may legitimately distinguish in this regard between providers in the degree for which such financial assurances are warranted. Thus, a state or local government may properly elect not to require as extensive bonds, letters of credit, or insurance provisions from providers (new or existing) with large assets and whose construction practices are well known, while at the same time imposing such requirements on providers with few assets or poor or unknown construction practices.

42. Freezing Statutes, Ordinances and Obligations. Chibardun (and other telephone industry commenters) contend that Rice Lake and other municipalities may not impose any requirements on new telecommunications providers that were not imposed on the incumbents when they entered the market. Given that the incumbents generally started operation in the late nineteenth century, Chibardun is thus asking this Commission to preempt up to 100 years of state and local statutes and agreements relating to the public rights-of-way and telecommunications providers. Any requirements imposed since (roughly) the Spanish-American War (1898), including health, safety, and environmentally-oriented requirements, would be subject to being prohibited. This is how Chibardun (and other industry commenters) contend this Commission must interpret Section 253 of the 1996 Telecommunications Act and its "competitively neutral and nondiscriminatory" provisions. An EIS is thus required.

43. Examples of Chibardun's contentions in this regard include the following, among others:

-- Its objection to any new telecommunications ordinance applying to it because "they have not been imposed upon GTE, Marcus Cable or other utilities when they entered the Rice Lake market," May 23 Letter to City of Rice Lake (Exhibit D to Petition) at 2;

-- Its repeated criticism of License Agreement and ordinance conditions and costs on the grounds that they "are not (and have never been) imposed upon the existing Rice Lake utilities," Petition, at 3;

-- Chibardun's contention that it has "a right to the same prompt grant of excavation permits that GTE, Marcus Cable and other utilities historically had enjoyed" Petition, at 9.

-- Chibardun's contention that it "could not lawfully be subjected to terms, conditions, occupancy fees and processing delays procedures [sic] different and more onerous than those imposed by the [city] upon other utilities." Petition, at 9, and

-- Chibardun's request for relief which asks the Commission "to preempt the City . . . (c) from adopting and enforcing any future right-of-way ordinances placing larger fees and more onerous conditions and restrictions upon entities seeking to furnish competitive telecommunications in Rice Lake." Petition, at 24-25.[9]

44. Industry commenters support Chibardun's claim in this regard. *See e.g.*, MCI's contention that the License Agreement is invalid "because it imposes far more onerous and expensive obligations upon new entrants than the existing Rice Lake Code imposes upon either GTE or Marcus." Comments of MCI Telecommunications Corporation, at 2.

45. Nineteenth Century Comparison. Chibardun makes various claims as to what the appropriate point in time is for comparing its obligations to those of other entities. As noted above,

[9] In addition, see Chibardun's repeated comparisons of its current treatment to the City's past treatment of GTE, Marcus and other utilities and contention that Chibardun is entitled to the same treatment going forward. "We believe that [Chibardun] has a right to same [sic] prompt grant of the easements (or street opening permits) that GTE, Marcus Cable and other utilities have historically received . . ." May 23 Letter at 1. And see Chibardun's repeated comparisons of terms of the draft License Agreement to terms the City has required of GTE or Marcus in the past. Petition, at 15-17.